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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO. 346.

UNION BANK & TRUST COMPANY,
PETITIONER,

VS.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF RESPONDENT.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statement of the case found in its brief at pages 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, contains a fair presentation of the facts in the case. We deem it unnecessary to comment on the same except to emphasize the fact that respondent specifically denied in his answer and no where admitted that the arrangement of State and National Bank shares as appears in Section 6 of the 1923 Revenue Act (General Acts, 1923, p. 152, Section 6)

is a classification for taxation purposes but claims that it is a method of valuation and assessment. The further fact is emphasized that there is no classified property tax in Alabama and that any benefit the "so called competing moneyed capital" may derive is by virtue of certain exemptions declared to be legal and that the taxation of such property is not at a *different rate,* but only the burden is less.

PETITIONER'S SPECIFICATION OF ERRORS.

Petitioner's specification of errors alleges that the equal protection clause of the Fourteenth Amendment is violated by the decision of the Supreme Court of Alabama for two reasons, to-wit:

1. Because other moneyed capital coming into competition with Petitioner is exempt or bears a lesser burden of taxation than do the shares of Petitioner.

2. Because the shares of certain competing National Banks are not taxed, by reason of the failure of the State to meet the conditions imposed by Section 5219 of the Revised Statutes as amended.

Petitioner's argument is based on these hypotheses:

1. That Section 6 of the Revenue Act of 1923 is a classification of State and National Bank shares into a single class.

2. That the failure to tax "other moneyed capital in competition" with Petitioner constitutes a violation of the equal protection clause of the Fourteenth Amendment.

3. That because of the failure to levy a valid tax against the shares of National Banks, the taxation of Petitioner's shares is in violation of the Fourteenth Amendment.

RESPONDENT'S ANSWER TO SUCH SPECIFICATIONS.

Respondent in answer to these propositions says:

(a) That the arrangement of State and National Bank shares as appears in Section 6 of the Revenue Act of 1923, is not a classification for taxation purposes but is a convenient method provided by the statute for the valuation and assessment of such shares.

(b) That the exemption of the species of property, generally referred to as moneyed capital, from taxation is not such a discrimination against Petitioner as to constitute a violation of the Fourteenth Amendment. That while these forms of property have been declared to be "competitive moneyed capital" within the meaning of Section 5219 of the Revised Statutes of the United States, yet their classification and exemption from taxation by the Legislature of Alabama was a reasonable classification and caused no unconstitutional denial of Petitioner's claim to equal rights.

(c) That the failure to levy a valid tax against the shares of National Banks is not in violation of the Fourteenth Amendment, because such banks are instrumentalities of the United States, and the Fourteenth Amendment does not require the State in taxing its own citizens, or corporations, who have life by its fiat, to tax them in conformity with the power it may exercise over Federal agencies.

ARGUMENT.

Section 211 of the Constitution of Alabama of 1901 provides:

"All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution of 1901 provides:

"The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes."

These Sections forbid, it will be seen, the arrangement of property into different classes and the taxation of such classes at different rates. There is not therefore, and cannot exist in the State of Alabama a classified property tax as found in the Constitutions of many of the states.

However the Supreme Court of Alabama has construed the guarantee contained in these two provisions of the Constitution to apply to *taxable property*. We refer briefly to some of the cases:

"The State has the power to exempt any class or item of property from taxation, and to declare what property shall be the subject of ad valorem or annual property taxation."

State vs. Birmingham Southern R. R. Co., 62 So. 77, 182 Ala. 475;
W. U. Telegraph Co. vs. State Board, 80 Ala. 273;
Phoenix etc. Co. vs. Montgomery, 117 Ala. 631;
Kidd vs. State, 188 U. S. 730.

"The power to classify is necessary to avoid oppressive results and is subject only to the limitations imposed by the State and Federal Constitutions. These limitations prohibit only those classifications which can be supported on no rational hypothesis."

W. U. Telegraph Co. vs. State Board, supra.

"Sections 211 and 217 of the Constitution of Alabama are not to be construed to prohibit exemptions from taxation nor reasonable classifications, nor to require the taxation of all property at precisely the same rate."

M. & G. R. R. vs. Peebles, 47 Ala. 317;
Moog vs. Randolph, 77 Ala. 597;
Phoenix Co. vs. State, 118 Ala. 143.

In the present case the Court said:

"Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion."

Petitioner's brief after quoting at length from Moog vs. Randolph, 77 Ala. 597, Phoenix Carpet Co. vs. The State, 118 Ala. 143, State vs. Birmingham Southern R. R. Co., 182 Ala. 475, contains the following statement:

"The effect of the decisions is that all subjects of property upon which the State levies an ad valorem tax must be taxed at the same rate and accorded equality of treatment, that the Legislature may select the subjects of taxation and accordingly may exempt from taxation such classes of property as it may determine, provided that its classifications for such exemptions are not 'arbitrary, capricious or without the semblance of reason.'"

By this statement Petitioner admits that there is no classified property tax in the State of Alabama in the usual meaning of the term, but that if property is declared to be taxable by the Legislature for ad valorem purposes all such *taxable property* must be taxed at the same rate. It follows therefore that if the Legislature fails to list as a subject of taxation certain property such property is thereby exempted.

It can likewise classify certain species of property and exempt such species from ad valorem taxation. It can not, however, tax one item or one species at one rate and another item or species at a different rate.

Therefore the first inquiry is, did the Legislature in exempting mortgages upon the payment of the privilege recording tax, the exemption of stocks and bonds of foreign corporations upon the payment of a similar recording tax, the exemption of money on deposit, solvent credits, and the shares of building and loan associations, mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate, and industrial loan companies, make a reasonable exercise of its power to classify and exempt.

THE EXEMPTIONS WERE LEGAL AND PETITIONER'S RIGHT TO EQUAL PROTECTION WAS NOT THEREBY DENIED.

It is respectfully submitted that these classifications are legal and reasonable.

The exemption of mortgages upon which the privilege recording tax has been paid has been upheld.

State vs. Alabama Fuel & Iron Co., 188 Ala. 487.

The exemption of securities of foreign corporations upon the payment of a recording privilege tax has been upheld.

Lee vs. State Tax Commission, 123 So. p. 6.

Solvent credits have been exempted from ad valorem taxation since 1915 and the reasonableness of this exemption has been sustained.

Barnes vs. Moragne, 145 Ala. 313.

The exemptions added by the Legislature of 1927, applying to the shares of building and loan associations, real estate loan companies, mortgage companies and industrial loan companies have not been before the courts except in this proceeding

It is respectfully submitted that none of these exemptions are so unreasonable, capricious or arbitrary as to be in themselves void or to constitute a denial of Petitioner's equal rights as guaranteed by the Fourteenth Amendment.

This Court has adopted with respect to the Fourteenth Amendment the rule as to classifications, similar to that laid down by the Supreme Court of Alabama in construing its own Constitution except that the Fourteenth Amendment does not deny to the states the right by tax-

ation to favor certain classes of business, if the State in doing so, taxes all in the same class alike and such classification is not wholly unreasonable and arbitrary.

The rule of classification has thus been laid down by this Court.

The taxing power of the State is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the State or Federal Constitutions.

Railroad Company v. Peniston, 85 U. S. 5, at p. 29;
Royall v. Virginia, 116 U. S. 592, at p. 597.

In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business,* or it may *select* for taxation certain classes and leave the *others untaxed.*

Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;
Southwestern Oil Co. vs. Texas, 217 U. S. 114, at pp. 124, 125 and 126;
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;
Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at page 189.

In cases in which the Legislature selects certain classes for taxation, the classes so selected may be *further subdivided according to certain differences* without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

Cooley on Taxation (4th Ed.), Secs. 349-350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Michigan Railroad Tax Cases, 188 Fed. 223, at p. 241;
Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the Legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th Ed.), Section 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547;
Hart Refineries v. Harmon, Treas., supra.

A classification of occupations for taxation made by the Legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable,* is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc. R. Co., 125 Pac. 577;

Chicago etc. R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

The State is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304.

The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method prescribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State ex rel Lewis, et al v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

In Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, this Court said:

"* * * The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all,* such as churches, libraries and the property of charitable institutions. *It*

may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, *and not tax securities for payment of money;* it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation,* * *"

Discrimination or difference in taxation of business conducted by a corporation and the same business when conducted by partnership or individual, has been sustained.

Flint vs. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389.

A statute forbidding operation of cotton gins by corporations manufacturing oil or meal was held not an arbitrary classification, the Court saying:

"Every state of facts sufficient to sustain such classification which can be reasonably conceived as

having existed when the law was enacted will be assumed.'

Crescent Oil Company vs. Miss., 257 U. S. 129, 66 L. Ed. 166.

The method of assessing railway corporations may be different from that of assessing other corporations and such assessment may be by different assessing bodies.

Ky. Railway Tax Cases, 115 U. S. 321, 29 L. Ed. 414;
Southern Railway v. Watts, 260 U. S. 519, 67 L. Ed. 375.

"A state may without violating the Fourteenth Amendment confine the recovery of back taxes to those due from corporations."

Fort Smith Lumber Co. v. Ark., 251 U. S. 532, 64 L. Ed. 396.

Assessing bonds and other securities of corporations at their par value, while other securities were assessed at their real value permitted.

Bell's Gap Ry. Co. v. Pa., 134 U. S. 232, 33 L. Ed. 892.

In Clark v Titusville, 184 U. S. 329, 46 L. Ed., 569, the Court sustained an ordinance of the city imposing a license tax on merchants by which they were divided into classes according to the amount of their sales, each class including those whose sales ranged between a certain minimum and maximum amount, although the result was to make persons in different classes pay different rates, and

to make those in the same class pay at a different rate if the amounts of their sales differed.

The use of trading stamps in selling goods justifies the imposition of license tax upon those so using the trading stamps, when the business not using such stamps not so taxed, sustained.

Rast v Van Deman & L. Co., 240 U. S., 342, 60 L. Ed., 679;
Tanner v. Little, 240 U. S. 369, 60 L. Ed., 691.

In Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed., 974, a license tax on the business of selling sewing machines was sustained, although merchants selling such machines at a located place of business were exempt.

In Central Lumber Co. v. S. Dakota, 226 U. S. 157, 57 L. Ed., 164, an act was held to be constitutional which affected only those selling goods in two or more places in the State, and did not affect persons selling goods in less than two places.

A license tax upon a laundry business was sustained, though it exempted steam laundries and women engaged in the business where not more than two women were employed.

Quong-Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed., 350.

A state may tax anthracite coal when ready for the market without taxing bituminous coal at the same time.

Heisler v. Colliery Co., 260 U. S. 245, 67 L. Ed., 237.

A state may levy an occupation tax on the mining of ore without levying it on other mining, while at the same time exempting contractors who strip off the old burden of soil, and all owners and lessees who do extensive development work without striking the ore.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. Ed., 930.

A tax imposed upon ore mines is not unconstitutional because not extended to quarries, forests or other property.

Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 70 L. Ed., 1093.

The Court sustained a workmen's compensation act which excluded from its operation an industry which did not employ four or more workmen or operatives regularly in the same business or in or about the same establishment.

Ward v. Krinsky, 259 U. S. 503, 66 L. Ed., 1033.

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action."

It is not necessary that the basis of the classification be deducible from the nature of the things classified. It is enough, for instance, if the classification is reasonably found in the purposes and policies of taxation.

Watson v. State Comptroller, 254 U. S. 122, 65 L. Ed., 170.

"The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. Ed., 597.

The applicable rule was thus stated by the Chief Justice of this Court in Ohio Oil Company vs. Conway, 281 U. S. 146, at page 159:

"The applicable principles are familiar. The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. *It may grant exemptions.* The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. *In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.* To hold otherwise would be to subject the essential taxing power of the state to an intoler-

able supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

In Farmers & Merchants Saving Bank vs. Minn., 232 U. S. 514, it was held that a statute providing for the registration of mortgages and their exemption from ad valorem tax, except when owned by savings banks did not violate the Fourteenth Amendment, such mortgages being used in determining the taxable surplus.—Bell's Gap R. R. Co. vs. Penn., supra, was quoted as authority.

We respectfully submit that under the foregoing authorities the exemption of the species of property complained of is not unreasonable or arbitrary, and does not deny to petitioner its constitutional rights. The business of insurance is entirely different from that of a bank. There are many and essential differences judicially known to the Court but whether known to the Court or not presumably before the Legislature between solvent credits, mortgages, money on deposit, and bank stock. Likewise the business of a building and loan association is distinctly and markedly different from that of a bank. A simple illustration is in the form of the shares of stock. Usually building and loan stock is of a withdrawable nature, having no permanency and few of the attributes of capital stock of other corporations.

Mortgage companies and industrial loan companies likewise conduct their busines in a manner essentially different from that of a bank. Their business generally speaking is limited to a particular form or class of security or commercial paper. The bank is regulated in a manner especially provided by law, there is a minimum capital for organization, it receives deposits both saving and commercial. It usually is a depository for the state and its sub-

divisions. Often times it acts in the capacity of executor or trustee. It lends on commercial paper and discounts the same. It may lend on real estate mortgages. It trades in stocks and bonds, and engages in many other forms of activities incidental or auxiliary thereto.

In truth the modern bank has been termed a financial department store. None of the companies, the exemption of which Petitioner declares to be in violation of his constitutional guaranty of equal rights enjoy the privileges nor are they qualified by law or equipped in fact to engage in the numerous activities as does the modern bank.

It is presumed that there were such facts before the Legislature as to make the classification legal.

> "Every state of facts sufficient to sustain such classification which can be reasonably conceived as having existed when the law was enacted will be assumed."
>
> Crescent Oil Co. vs. Miss., 257 U. S. 129.
>
> "The legislative determination of such question is conclusive upon the courts, unless it appears that upon the face of the statute, or from the facts of which the courts must take judicial cognizance, that the statute infringes rights secured by fundamental law."
>
> Powell vs. Penn., 127 U. S. 678. (quoting from headnote).

Petitioner is seeking we submit, to apply to the Fourteenth Amendment the restriction placed by Congress on the taxation of National Banks and as construed by this Court. The restriction of 5219 applies to competing moneyed capital. It is not pointed out that this Court

has any where held that competition is the criterion in determining the reasonableness of a classification under the Fourteenth Amendment. To the contrary, the cases above cited show many businesses which are actually competing and which are essentially the same, but this Court has upheld the right to classify and *further subdivide according to certain differences* without violating the equal protection provision of the Fourteenth Amendment.

We respectfully submit that the effect of these decisions is to remove any Federal question which might arise by virtue of the exemption of these species of property declared by Federal Courts to be competing moneyed capital within the meaning of Section 5219 of the Revised Statutes. The State of Alabama had a right to make classifications and exempt property thus classified. The Supreme Court of Alabama has held that such classifications are reasonable and that in making such classifications the Legislature did not violate the equality clause of the State Constitution. It is submitted that under the numerous cases heretofore cited and others which we have not adverted to, these classifications are reasonable under the Fourteenth Amendment of the Federal Constitution. Therefore in taxing the shares of state banks and failing to tax mortgages, mortgage loan companies, and building and loan associations, the State did not violate either its own Constitution nor did it violate the equal protection clause of the Fourteenth Amendment. Classification is a legislative prerogative. It cannot be said that such classifications are unreasonable. The Supreme Court of Alabama has held that they were not. Therefore so far as the exemption of these species of property from ad valorem taxation, the Petitioner cannot complain.

The next and chief question is whether the failure to tax national banks because of the failure to tax "other competing moneyed capital" within the meaning of Section 5219 of the Revised Statutes of the United States constitutes a violation of Petitioner's right of equal protection within the meaning of the Fourteenth Amendment.

SECTION 6, ACTS 1923, PAGE 152, IS AN ARRANGEMENT FOR VALUATION AND ASSESSMENT AND IS NOT A CLASSIFICATION FOR TAXATION.

There are two contentions made by Petitioner with respect to national bank shares. Namely that Section 6 of the Revenue Act of 1923, is a classification for tax purposes, and second, that state and national banks are so one and the same species of property that any benefit received by one inures to the other.

Petitioner points out on page 24 of his brief various methods of valuing property for assessment.

Section 4, Acts 1923, page 152, provides that:

> "All *taxable property* within this state shall be assessed for the purpose of taxation at sixty per cent of its fair and reasonable market value."

Section 2B, Acts 1923, page 152, provides for the levy of taxes according to the rates fixed by the Constitution. This Section provides as follows:

> "There is hereby levied for the purpose and upon the property hereinafter named and not specifically exempted from taxation and the property named in all other revenue laws of this State not specifically repealed by this act annual taxes as follows, to-wit: a. For the maintenance of the public schools of this State, thirty cents on each one hundred dollars of

the assessed value of taxable property. b. For the relief of needy Confederate soldiers and sailors, resident citizens of Alabama, and their widows, ten cents on each one hundred dollars of the assessed value of taxable property. c. For the use of the State and to raise revenue therefor, twenty-five cents on each one hundred dollars of the assessed value of taxable property."

Section 214 of the Constitution of Alabama, 1901, provides that:

> "The Legislature shall not have the power to levy in any one year a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property within this state."

In the case of State v. Birmingham Southern Railway Company, 182 Ala. 475, this Section and the kindred Sections 211 and 217 were construed in this manner:

> "It is perfectly clear that there is nothing expressed or implied in the language of this limitation which prohibits the Legislature from fixing as a basis for taxes any percentage of the actual value of the property whether greater or less than one hundred per cent thereof, provided only that such rule is applied without discrimination to all property of the same nature."

In obedience to the mandates of the Constitution, the Legislature has provided different methods of ascertaining sixty per cent of the fair and reasonable market value of different kinds of property. Real and tangible personal property are valued by the County Tax Assessor and finally fixed by the County Board of Review. Public utilities are valued by the State Tax Commission. Shares

of general corporations are finally valued by the State Tax Commission. Shares of banks are valued by the State Tax Commission subject to a final valuation by the County Boards of Review. Any assessment made by the local authorities may be set aside and revalued by the State Tax Commission within the current year. The purpose of all these methods, however, is identical, namely to determine what is the fair and reasonable market value of the property.

We respectfully submit, therefore, that the grouping of State and National Banks as is done in Section 6 of the 1923 Revenue Act is not to be termed and is not a classification for purposes of taxation. The sole purpose of this Section, we submit, is to determine the fair and reasonable market value of the shares for purposes of taxation, and to make the bank the agent of the shareholders for the payment of the taxes. While this is argued most strongly to constitute a classification, it is submitted that this is nothing more nor less than providing that a different body may determine the fair and reasonable market value of the property for purposes of taxation, than the body which values real and tangible personal property. If the various boards are able to value the properties placed in their jurisdiction in accordance with the mandate of the law, there can be no discrimination or difference between any kind or species of taxable property within the State of Alabama.

We respectfully submit that to hold this to be a classification for taxation purposes would constitute the taxing of property at different rates, and hence be violative of the uniformity provisions of the State Constitution. All property must be taxed at the same rate. All property must be valued at a certain percentage of its fair and reasonable market value, which is at present sixty per

cent. Beyond this the Legislature or the taxing authorities cannot go in making classifications.

We therefore submit that the arrangement in Section 6 of the Revenue Act of 1923, is nothing more than an effort on the part of the Legislature to fix a practical method by which the taxing authorities can be governed in finding out what is the fair and reasonable market value of the shares.

THE FAILURE TO LEVY A VALID TAX AGAINST THE SHARES OF NATIONAL BANKS DOES NOT INVALIDATE THE TAXATION OF THE SHARES OF A STATE BANK.

As we conceive it the principal question before this Court is whether a State must limit its taxation of its own subjects to that levied against similar property of an instrumentality of the United States, and whether the states in exercising their jurisdiction over their own subjects are required by the Fourteenth Amendment to so tax them that such taxes will conform to the authority and power which it has over Federal instrumentalities.

Thus presented the question is of far reaching importance and one which transcends the mere question of Petitioner's asserted inequitable treatment under the condition existing in Alabama at the time of the inception of this suit. As we conceive it, it involves a new interpretation of the Fourteenth Amendment and an extension of its sphere into a new and hitherto uncharted sea. The sovereignty reserved to the states is challenged, not because of a discrimination between its own subjects, but because of a discrimination existing between it and instrumentalities of the Government of the United States over which the State has no power or control except such as may be accorded it by the Federal Congress.

The question here presented is, we respectfully submit, one involving the inherent powers of the State. The decision here to be made determining to a great extent as it will the effect of the Fourteenth Amendment on the inherent powers of the State, will, as we conceive it, decide not merely whether the Union Bank and Trust Company should be refunded some $2500.00, but will affect to a great extent the sovereignty of the State. It is a question not to be determined on the abstract question of the justice or injustice done to this particular Petitioner, but must be decided on the fundamental principle involved. We submit that it is a far reaching principle to declare that because the Federal Government forbids or the State of Alabama is without authority to tax an instrumentality of the government, then the State is without authority to tax its own legitimate subjects whose business is of a nature similar to that conducted by the Federal instrumentality.

We take these propositions to be so oft and clearly decided as to have become axiomatic. That the power of the State over all subjects not granted to the Federal Government to be inherent. That wherever a power has been delegated to the Federal Government, the State is without authority except as it may be authorized by the Federal Congress. That the national government has the right and power to organize and create national banks in the promotion of its fiscal policies. That the Government may not tax the instrumentalities of the State. That the states may not tax the instrumentalities of the Government. That therefore the national bank being an agency and instrumentality of the Government, the State is without power to tax it in any manner whatsoever except as may be granted by the Federal Congress.

This Court has thus laid down the rule:

"Congress may prohibit any taxation of national banks by states, cities, counties, or towns, and its mere silence on the subject if it were silent would be a prohibition."

First National Bank vs. Richmond, 13 Supreme Court Reporter, 1044, 149 U. S. 769, dismissing appeal 39 Fed. 309.

"The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks, and property assets, or franchises were it not for the permissive legislation of Congress."

Citizens Savings Bank vs. Owensboro, 173 U. S. 636, 19 Supreme Court Reporter 530, 43 L. Ed. 840.

Therefore a national bank is not a subject over which the State has the power of taxation either inherent or otherwise except at the caprice of Congress.

Congress has permitted or granted to the States the right to tax the shares of national banks in limited manner. The State of Alabama in attempting to tax the shares did not meet the limitations and restrictions placed on this power by the Federal Congress. The effect, therefore, is to exempt the shares of national banks. As was stated in the majority opinion of the Supreme Court of Alabama, the rule is that the states in exercising this delegated power must exercise it in accordance with the restrictions placed thereon by Congress else the effort to exercise this power is abortive and void.

The effect of the failure of the State of Alabama to effectively tax the shares of the national banks doing business in Montgomery and competing with Petitioner renders the shares of such national banks wholly and com-

pletely exempt from State taxation. The states have hitherto been entirely without power to tax the personal property of national banks. Therefore with respect to shares, the Petitioner is now in the identical situation as has hitherto existed with respect to personal property. Personal property of national banks is not taxed because Congress has not authorized it. Personal property of state banks is taxed. Shares of national banks competing with Petitioner are not taxed because the State has not complied with the conditions imposed by Congress. Shares of state banks including this Petitioner are taxed under the decision of the Supreme Court of Alabama.

The Petitioner asserts that the failure to meet the restrictions imposed on the power of the State to tax national banks voids its power to tax the shares of state banks.

We respectfully submit that if this rule be sound then the taxation of the personal property of Petitioner is and has continuously been a violation of its equal rights, because similar property belonging to competitive national banks was entirely exempt from taxation. Perhaps this rule would extend to any corporation which may do a competitive business.

This brings us back to the fundamental question involved: Does the Fourteenth Amendment require the state to tax property similar to that owned by Federal instrumentalities in accordance with the power which it may have granted to it to tax such instrumentalities?

The Government of the United States is a government of delegated powers,—in the exercise of which powers it is supreme, and the states are without any power whatsoever to hinder, delay, or obstruct the operation of the Government either when operating directly or through its legal instrumentalities.

Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheat. 316, thus laid down the rule which we conceive to be applicable in the present case:

"The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

"There is nothing in the Constitution of the United States, similar to the articles of Confederation, which exclude incidental or implied powers.

"If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

"The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

"If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

"All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident.

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not."

It will be observed, therefore, that the Supreme Court of the United States in this ruling declared that the Bank of the United States, a private corporation, organized under authority of an Act of Congress, the stock of which was owned by private individuals, was an instrumentality or agency of the United States, and that the taxing power of the states does not extend to such agency.

About ten years later, the Supreme Court of the United States decided the case of Weston v. City Council of Charleston, 2 Pet. 449, a case involving an attempt on the part of the City of Charleston to tax bonds of the United States. The opinion of the Court in this case was likewise rendered by Chief Justice Marshall and in denying the power of the City of Charleston to levy such a tax, he said:

"A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought therefore on the principle settled in the case of McCulloch v. The State of Maryland, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states. * * *

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of the government. It may be carried to an extent which shall arrest them entirely. * * * The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

These decisions demonstrate that at a very early date it was established beyond question that no instrumentality of government or governmental operation of the United States, was subject to the taxing power of the states. From that time down to the present date, there is a long line of authorities following these two early decisions of Chief Justice Marshall. All sorts of federal agencies and governmental operations have been involved in these decisions, such as national banks and similar federal agencies.

In comparatively recent times, the Supreme Court has had occasion to consider whether this exemption of Federal agencies from taxation extended to the municipalities of a Territory of the United States, and in the case of Farmers Bank vs. Minnesota, 232 U. S. 616, it was held that territories and their municipalities and governmental operations, including bonds issued by them, may not be taxed by the State.

In recent times the United States has very frequently created governmental agencies in the form of private corporations, a typical example of which is the system of Federal Land Banks which has been established under the

Act of Congress. The farm loan bonds issued by these banks were held not subject to State taxation.

Smith vs. Kansas City Title Company, 255 U. S. 180.

Even mortgages payable to such Banks have been held exempt from the same priviiege recording tax, complaint of which is made in this suit.

Federal Land Bank vs. Crosland, 261 U. S. 374.

The property of the United States Shipping Board Emergency Fleet Corporation has been held to be immune from State taxation even though the Corporation is a private corporation.

King vs. United States Shipping Board Emergency Fleet Corporation, 282 Fed. 950;

The property of the United States Spruce Corporation was held exempt from State taxation.

Clallam County vs. United States, 263 U. S. 341;
Erickson vs. United States, and United States Spruce Corporation, 264 U. S. 246;

The property owned by the United States Housing Corporation was held exempt from State taxation.

City of New Brunswick vs. United States, 276 U. S. 547.

There are innumerable cases in which the United States has employed corporations and individuals as its agents to carry out some governmental purpose. The Courts

have uniformly held that such individuals and corporations, in the exercise of the governmental functions entrusted to them by the Federal Government were exempt from taxation by the states. See for instance;

Jaybird Mining Co. v. Weir, 217 U. S. 609;
Gillespie v. State of Oklahoma, 257 U. S. 501;
Missouri K. & T. Ry. Co. v. Meyer, 204 Fed. 140.

The extent to which the policy of the Government has been followed in creating private corporations to carry on certain activities was thus indicated in Skinner & Eddy Corp. vs. McCarl, 275 U. S. 1:

"Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United States Grain Corporation) was organized under the laws of Delaware under the Food Control Act, August 10, 1917, C. 53, Sec. 19, 40 Stat. 276. See Acts of March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders, August 14, 1917, March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to the Act of July 9, 1918, c. 143, 40 Stat. 845, 888-889, for the purpose of aiding the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under the Act of June 4, 1918, c. 92, 40 Stat. 594, 595. The War Finance Corporation was organized under the Act of April 5, 1918, c. 45, 40 Stat. 506, to assist financially, industries important to the successful prosecution of the War. For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connec-

tion with the Canal. And, since the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the Government-owned inland waterways system pursuant to the Act of June 3, 1924, c. 243, 43 Stat. 360. The Government likewise has established, and holds all the stock in the Federal Intermediate Credit Banks, formed under the Act of March 4, 1923, c. 252, Sec. 205, 42 Stat. 1454, 1457, to bring about easier agricultural credits."

Attention is called to the recent Act creating the Reconstruction Finance Corporation and similar emergency relief agencies.

This principle of immunity as applied to national banks has thus been stated:

> "The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks and property assets or franchises were it not for the permissive legislation of Congress."
>
> Citizens Savings Bank vs. Owensboro, supra.

Therefore a national bank is such an arm of the Government of the United States as to enjoy the immunity of the Government. While all power over such instrumentalities is vested in the Federal Government, Congress may grant or delegate to the states certain powers including that of taxation, but when it does so the states are limited in their exercise of the power to the terms and restrictions placed upon its exercise by the Federal Congress.

Is a Federal instrumentality of such nature that subjects of a State can invoke the Fourteenth Amendment for their own protection because the State fails through

lack of power to accord the same treatment to a Federal instrumentality?

We submit that if this rule is sound it should be applied without limit and without exception.

The Government of the United States through its various agencies engages in many and various forms of business. The national bank itself, according to the record of the cases heretofore before the Court has numerous powers by charter and almost unlimited "incidental" powers. So great has been the expansion of Federal activities during recent years that there are comparatively few lines of business on which a Federal instrumentality does not impinge and with which it does not compete. For this Court to declare that the power of the State over its own citizens is to be limited under the Fourteenth Amendment to the power it may have over a Federal instrumentality is, we submit, revolutionary in its nature and beyond the meaning and purpose of the Fourteenth Amendment.

Petitioner argues with great force that the State has specially classified state and national banks. We respectfully ask, is such a classification possible? The state bank receives its life from the Legislature of Alabama. The laws regulating it are such as the Legislature may see fit to impose. It is under the supervision of the State Banking Department created by law. Its powers may or may not be different from those of national banks. State banks are private corporations. They are not agencies of the State of Alabama. They are subjects of the State of Alabama, created under general law.

The national bank is organized under the authority of Congress. Its powers and regulations are fixed by Congress. Its supervision is by the United States Treasury.

It has been repeatedly declared to be a Federal instrumentality.

The State can in regulating state banks lay down any rules which it sees fit, and the fact that Congress has laid down different rules relative to national banks cannot affect or alter the validity of the rule laid down for the state banks. The power of the Legislature to create them, to regulate them or to abolish them is, we conceive, without question.

On the other hand no action of the Legislature of Alabama can affect national banks. They would continue to live if the states abolished the state banks. The State cannot regulate or determine their manner of operation. Even criminal offenses committed by its officers are, generally speaking, triable in Federal Courts. Only in the matter of taxation has Congress seen fit to grant certain powers to the states with reference to national banks. It is now asserted that Congress having seen fit to grant a restrictive power of taxation as to the shares of national banks, the State must tax the shares of state banks accordingly. We submit that if this position is logical, the state bank could invoke the Fourteenth Amendment if the regulations imposed by state law were more stringent than those imposed by Congress on national banks. If this conclusion be possible, then the power of the states over the banking corporations created by the authority of their laws is innocuous and wholly subject to the behest of the Federal Congress.

Is and can the situation be any different in the matter of taxation? The State of Alabama has an inherent power to tax all property within its jurisdiction. It has no power to tax property without its jurisdiction. Federal instrumentalities are without its jurisdiction. The Fourteenth Amendment guarantees to the citizens equal pro-

tection of law. To now declare that the State must tax its own subjects according to the manner in which it taxes a Federal instrumentality is a novel principle. Carried out logically it appears to Respondent that these conclusions inevitably follow: (1) That if Congress permits the State to tax all the property of Federal instrumentalities at the full rate and the full valuation provided by law, then the State can likewise tax its own subjects in the same manner and to the same extent. (2) If Congress should declare that the states can tax Federal instrumentalities upon a valuation of only fifty per cent, then the states would be limited to a fifty per cent valuation in applying the law to their own subjects. (3) If Congress permits the taxation of real estate of Federal instrumentalities and is otherwise silent the states are limited to the taxation of real estate of their own subjects. Logic would seem to demand if no power is granted, all similarly classed should be exempt.

The force and effect of Petitioner's brief is that if Congress does authorize any taxation of a Federal instrumentality then the states must exercise the power but can exercise it only in the manner limited by Congress, and must apply the same rule to all other property similarly situated.

It is asserted with confidence that the Fourteenth Amendment requires this. Is this Court prepared to say to the State of Alabama and to the forty-seven other states of the Union, that the Federal Government may create national banks, farm land banks, intermediate credit banks, housing corporations, fleet corporations, spruce corporations, and engage in numerous other businesses or quasi business enterprises, invest them with governmental immunity and declare to the states that they must legislate in regard to their own subjects in the man-

ner which the Government permits them to legislate as to its own instrumentalities?

Surely in fact and in law, there is no difference between refusing entirely to exercise a power and in attempting to exercise it and failing. The discrimination, if there is a discrimination, exists the same in one case as it does in the other. The only difference is that the State attempted to correct it and failed.

We believe that under the authorities above cited and quoted, we have demonstrated that if there were no national banks the State has, in granting the exemptions complained of, violated no provision of the Fourteenth Amendment. The Supreme Court of Alabama has upheld them with reference to the uniformity provision of the State Constitution. While national banks are in a sense in the same class with state banks, both conducting in a general way the same sort of business, yet we confidently assert that a Federal instrumentality ipso facto cannot legally speaking ever be in the same class as a private corporation organized under the general laws of a State. If this be true, then the argument as to classification falls. Even though this Court should be of the opinion that they are of a similar nature, yet we must submit and insist that the protection of the Fourteenth Amendment cannot be measured by and based on the power of the states over Federal agencies. Otherwise any legislation whatsoever that the states enact regulating or taxing their own subjects is subject to the ever recurrent question: Is a Federal agency similarly situated treated accordingly? Such construction places the states under the control, caprice, and behest of the National Congress. the Tenth Amendment is abrogated in favor of the Fourteenth.

The Supreme Court of Alabama decided that Sections 211 and 217 of the Constitution "were limitations on the inherent power of the state and not on the power to tax delegated by the Federal Statute."

> "But where as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitations embodied in Section 217 of the Constitution to taxes levied in the exercise of the states' inherent power on domestic bank stock."

It is submitted that the reasoning of the majority as to Section 217 of the State Constitution applies with equal force to the Fourteenth Amendment. The right of the Legislature to classify and exempt has been, as pointed out, similarly construed under this Section of the State Constitution and under the Fourteenth Amendment. The highest Court of the State has decided that the guarantee of Section 217 applies only to those things over which the State has inherent power. We submit as was concluded by the Supreme Court of Alabama that the guarantees of the Fourteenth Amendment should be likewise construed and that it does not require the taxation of property of the citizens of a State according to the power which it may be granted, or may choose to exercise over Federal instrumentalities.

Prior to Central State Bank vs. Bennett, 284 U. S. 239, no decision of this Court, so far as we have been able to discover had applied the Fourteenth Amendment to facts such as in this case. Nor, we respectfully submit, is the decision in that case conclusive. The basis of the Court's finding that the Fourteenth Amendment had been violated was the taxation of other moneyed capital, which had been specially classed by statute with state and national

bank shares, at a different rate. The situation is not the same here. Alabama differently classifies this moneyed capital and exempts it entirely. We have demonstrated, we believe, under the cases quoted these exemptions were constitutional. If this be true, the failure to tax national bank shares is the sole question here presented, and this is not foreclosed by the Bennett case.

The various cases construing the Fourteenth Amendment refer to property within the "jurisdiction" of the States. Surely jurisdiction, as thus used is not merely territorial. Clearly it means property over which the State may extend its laws.

If it means this, the Fourteenth Amendments does not apply to property belonging directly to the Government of the United States.

If it means this, it does not mean property of Federal instrumentalities which the states have been granted no right to tax at all.

Does it apply to Federal instrumentalities over which the State has a limited power?

If the latter applies does it apply without limit or degree?

We respectfully submit the rule to be logical must be universal.

Can this Court say that the Fourteenth Amendment guarantees to the citizens and corporations of Alabama the following:

Equal treatment with like property of the Government of the United States located within the State.

The answer is obviously in the negative.

Equal treatment with like property of Federal instrumentalities over which the State has been granted no power.

The answer according to Petitioner is still in the negative.

Equal treatment with like property of Federal instrumentalities, over which the State has been granted certain limited powers.

Petitioner says if any power is given it must be applied equally to all persons in the same class.

In other words, if Congress permits taxation at one per cent or at a valuation of ten per cent, the rate or valuation for all property similarly classed must be lowered to conform to the Fourteenth Amendment.

We submit the difference between an immunity absolute and partial, is one of degree, not of kind.

CONCLUSION.

It is submitted that the protective guarantees of the Fourteenth Amendment apply only to property which is in the jurisdiction of the states, in both a legal and a territorial sense, and were not intended to require the states to extend the same treatment to their own subjects accorded to the United States, or its instrumentalities.

Respectfully submitted,

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